No. 20030

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA CITIZENS BAND ASSOCIATION, INCORPORATED, a Corporation,
Petitioner,

vs.

THE UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

PETITIONER'S OPENING BRIEF

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PETITIONER'S OPENING BRIEF

I. INTRODUCTORY

Petitioner, CALIFORNIA CITIZENS BAND ASSOCIATION, INCORPORATED, is a tax exempt, non-profit corporation, duly incorporated under the laws of the State of California, a citizen and resident of the State of California with its principal office in Alameda County, California. Each member of petitioner is an organized Citizens Band Radio Club, membership of which consists of radio station licensees, duly licensed by respondent FEDERAL COMMUNICATIONS COMMISSION to hold radio station licenses in the Class D Citizens Band. That there are approximately nine clubs located in

Northern California which are members of petitioner. That the members of the individual clubs are from all walks of life, including invalids and disabled persons. That petitioner herein timely filed its petition for rehearing in regard to the proposed rule changes on August 26, 1964. (Transcript of record Vol. 2-C, pg. 846-852).

The Citizens Radio Service is a relatively recent avenue of communication afforded citizens of the United States. No technical radio knowledge is necessary to obtain a license, and the only thing the applicant must do to qualify is to familliarize himself with the rules and regulations of the respondent Commission pertaining to the Citizens Radio Service. The Citizens Radio Service differs from the Amateur Service in that the amateur, in order to obtain his license, must pass a code reception and radio theory examination. The Citizens Radio Service is a low-powered, short range system of communication. There are four classifications of station licenses in the Citizens Radio Service which are listed as follows:

1. Class A which is on an assigned frequency available to that service in the 460-470 MC/S frequency band, with an authorized plate input power of 60 watts, or less;

2. Class B which is one on an authorized frequency available to that service in the 460-470 MC/S frequency band with an authorized plate input power of 5 watts, or less;

3. Class C is a station operating on an authorized frequency in the 26.96-27.23 MC/S frequency band, or on the frequency 27.255 MC/S, for the control of remote objects or devices by radio, or for the remote actuation of devices which are used solely as a means of attracting attention;

4. Class D is a station operating on an authorized frequency in the 26.96-27.23 MC/S frequency band, or on the frequency 27.255 MC/S with an authorized plate input power of 5 watts, or less, for radiotelephony only. (There are 23 channels of communication in this band.)

A Class A station is authorized to operate as a mobile station, as a base station, or as a fixed station. The remaining stations are primarily licensed as mobile stations, but under certain conditions may operate at fixed locations. In our text herein, we are concerned only with the Class D Station and not the other three. At the present time, there are approximately 1,000,000 Class D Stations licensed by respondent FEDERAL COMMUNICATIONS COMMISSION to operate one or more units.

Citizens Radio Service equipment is readily available and its use is widespread and valuable. In times of emergency, the Service has saved lives and property and, in many instances, has been the sole means of communication in stricken areas. The use of Citizens Radio Service, or "CB" as it is known, has been of inestimable help to farmers and others in rural

and remote areas in enabling them to communicate with their bases of operation. Civilian Defense groups have made great use of CB, as have many law enforcement agencies. Thousands of businesses have and still are employing CB in their commercial activities such as communication between company vehicles and headquarters. Millions of dollars have been spent by licensees for CB radio equipment. An examination of the transcript herein will show that CB'ers hailing from every section of our country are concerned with the rule changes of respondent FEDERAL COMMUNICATIONS COMMISSION which became effective April 26, 1965.

II. HISTORY OF THE CITIZEN'S RADIO SERVICE

In 1944, in Docket No. 6651, see *9FR10270-10272* respondent Commission recognized the fact that a complete review of present allocations of bands of frequencies in the radio spectrum was necessary as the result of important advances in the radio art which were made during the war and the demands for the use of radio which were greatly increased. Pursuant thereto, the respondent commission announced that a hearing would be held on September 28, 1944 to consider the foregoing and related matters.

In *10 FR 2257-2258*, under date of February 27, 1945, respondent Commission announced oral argument in regard to Docket No. 6651 would be heard February 28, 1945, and that one of the items to be considered was the Citizens Radio Communication

Service. This was the first time that the aforesaid designation was used.

In *11 FR 11227-11230*, under date of September 17, 1946, respondent Commission adopted a new table of service-allocations of frequencies. Included therein was an allocation of 460-470 MC/S to the "non-government citizens radio." Again on November 13, 1946, see *11 FR 13704-13707*, the respondent stated that it would be interested in "securing the cooperation of maufacturers and others in preparing technical requirements for equipment to be used in the Citizens Radio Communication Service." The respondent Commission further stated on page 13705 as follows:

> "The posible uses of this service are as broad as the imagination of the public and the ingenuity of equipment manufacturers can devise. . . ."

The respondent Commision then went on to allocate the band to Class A and Class B Stations. Said respondent then went on to explain how type approval for the equipment to be used could be obtained. The Citizens Band was thus on its way to becoming a reality.

On July 15, 1947, in *12 FR 4689*, respondent Commission outlined the proposed frequencies to be used by Class A and B Stations, frequency tolerance and the procedure for securing type approval of equipment.

On October 31, 1947, in *12 FR 7081*, respondent Commission announced that effective December 1, 1947, a new Part 19, entitled "Rules and Regulations Governing Citizens Radio Service" be created. In *19.1* Basis and Purpose, respondent stated:

> "The following rules and regulations are issued pursuant to the provisions of Title III of the Communications Act of 1934, as amended which vests authority in the Federal Communications Commission to regulate radio transmissions and to issue licenses for radio stations. These rules are designated to provide short-distance radio communication, radio signalling, and control of objects by radio with minimum licensing requirements, and to provide procedures whereby maufacturers of radio equipment to be used or operated in the Citizens Radio Service may obtain type approval of such equipment."

The first rules governing CB were thus created. An analysis of the same will show that they were relatively simple. However, on the same day of October 31, 1947, respondent in *12 FR 7095* stated that it expected to publish proposed rule making covering licensing procedure and regulations concerning the use or operation of stations in the near future. Also, that licenses would not be isued until the complete Part 19 was adopted.

On June 23, 1948 in *13 FR 3377*, the official definition of respondent for the Citizens Radio Service was given as follows:

> "A radio communication service of fixed, land or mobile stations, or combinations thereof, intended for use by citizens of the United States for private or personal radio communication (including radio signalling, control of objects by radio, and other purposes.)"

On August 19, 1948, in *13 FR 4796-4798*, respondent gave notice of proposed rule making in regard to the completion of Part 19. Under *19.2* the definition of Citizens Radio Service was given as follows:

> "A fixed and mobile service intended for use for private or personal radio communication, radio signalling, control of objects or devices by radio, and other purposes not specifically prohibited herein. Any citizen of the United States eighteen years of age or over is eligible to be licensed in this service."

Section *19.59* states in regard to permissible communications:

> (a) "Each station in the Citizens Radio Service is authorized to communicate with other stations in this service."

On April 5, 1949, in *14 FR 1597*, respondent Commission announced that the applications on file of persons who were eligible under the rules governing any other service would be put in the pending file and would not be acted upon until final agency determination.

In 1951, in *16 FR 11738*, the respondent announced proposed rule making to permit a new class (c) of radio station which may be used for the control of objects or devices by radio on the frequency 27.255 MC.

In 1955, applications for licenses were still not being granted but were placed in the pending files. See *20 FR 857*.

On December 19, 1956, in *21 FR 10414*, respondent Commission proposed to delete the requirement that applications from those who are eligible under the rules governing any other service be placed in the pending file. Comments were invited.

On April 16, 1957, respondent Commission published in *22 FR 2583*, its proposal that 26.96-27.3 MC/S band be reallocated to the Citizens Radio Service. In addition, respondent Commission amended *Part 19.2* to read as follows:

> "*Citizens Radio Service*s A fixed and mobile radio service intended for personal or business radio communication, radio signalling, control of remote objects or devices by means of radio, and other purposes not specifically prohibited in this part."

Part 19.51 (b) reads:

> "Any station licensed in this service may be used to provide a radio communication service

> to any person, including the licensee of another station in the same service, on a strictly voluntary and no-charge basis; however, no other form of cooperative or shared use of facilities licensed in this service shall be permitted."

On April 17, 1957, in *22 FR 2684*, respondent proposed to institute further inquiry into the allocation of frequencies to non-governmental services in the radio spectrum between 25 MC's and 890 MC's.

Then again on June 28, 1957, *22 FR 4533*, the Commission defines the Citizens Radio Service as follows:

> "A radio communication service of fixed land or mobile stations, or combinations thereof, intended for use by citizens of the United States for private or personal radio communication (including radio signalling) control of objects by radio, and other purposes."

On April 24, 1958, in *23 FR 2737-2740* respondent announced the amendment of Part 19 to be effective May 28, 1958. Section *19.2 (a)* as amended, reads as follows:

> "Definitions (a) Citizens Radio Service. A service of fixed, land and mobile stations intended for personal or business radio communication, radio signalling, control of remote objects or devices by means of radio, and other purposes not specifically prohibited in this part."

On August 9, 1958, in *23 FR 6111-6112*, respondent announced that effective September 11, 1958, the 26.96-27.23 MC/S band would be allocated to the Citizens Radio Service. Further, on the aforesaid date, in *23 FR 6132*, effective September 11, 1958, respondent amended *Part 19.2* to include the Class D Citizens Radio Station, which was defined as follows:

> "A mobile station in the Citizens Radio Service operating on an authorized frequency in the 26.96-27.23 MC frequency band with an authorized plate input power of 5 watts, or less, for radiotelephony only. (Class D stations are authorized to operate as mobile stations only; however, they may be operated at fixed locations in acordance with other provisions of this part)"

Part 19 was further amended effective September 11, 1958, to provide the rules and regulations for the operation of the aforesaid Class D stations. Licenses for all stations in the Citizens Radio Service were to be issued for a term of five years.

On March 12, 1959, in *24 FR 1791*, respondent allocated 27.255 MC to be used by Class D stations on a shared basis with stations in other services, effective April 15, 1959. Class D stations thus were able to operate on 23 channels in the band and the frequencies were set forth in *19.31 (d)* to read as follows:

"MC	MC	MC	MC
26.965	27.035	27.115	27.185
26.975	27.055	27,125	27.205
26.985	27.065	27.135	27.215
27.005	27.075	27.155	27.225
27.015	27.085	27.165	27.255
27.025	27.105	27.175"	

On July 29, 1959, in *24 FR 6059-6060*, respondent proposed for the first time that there be a silent period after five minutes of communication between Class D stations. Also, that all transmissions from a Class D station must be addresed to specific persons or stations. Comments were invited.

On February 17, 1960, in *25 FR 1408*, respondent Commission referred to its proposals of July 29, 1960 *(24 FR 6059)* by issuing a policy statement outlining new rules. The respondent stated as follows on pages 1408-1409 (in regard to comments which had been sent in):

> "Due to the large number, it is not feasible to list here all such comments nor to discuss the various positions of all interested parties. No effort was made to tabulate the number of parties whether supporting or opposing the proposed changes. In this connection, it should be noted that one comment which contains logical and sound reason is more helpful to the Commission and is entitled to more weight by the Commission in the disposition of the issues involved in the proceeding."

Further, the Commission points out that its intention is that the Citizens Radio Service is contemplated basically as a service for intercommunication between units of a single station rather than between separate stations. This, apparently, is the first time that the Commission has stated such a policy.

In addition, amended *paragraph f of Section 19.61* limited any exchange of communications between two or more Class D stations to not more than 5 consecutive minutes followed by a two minute silent period during which the licensee shall monitor the frequencies used and other stations provided an opportunity to the use the frequencies.

The aforesaid amendments were made effective March 15, 1960.

On November 22, 1962, in *27 FR 11500*, respondent Commision initiated the proposed rule making which eventually culminated in the adoption of the rules which went into effect April 26, 1965, and which petitioner attacks herein. The proceeding was entitled "Docket 14843." Comments were invited and thousands of persons responded. No public hearings were held although the same were requested. (See Transcript of Record, Vol. II-D, page 932 and Vol. II-C, page 852). A copy of the proposed rule making is attached to petitioner's petition and marked "Exhibit A". It will be noted that respondent Commision had evidence independent of the comments of interested persons in that *27 FR 11500* states as follows:

> "However, monitoring, inspections and investigations by the Commision as well as numerous letters from licensees complaining of the unnecesary interference to their operations indicate that misuse of citizens radio station operaing privileges is so prevalent in some areas as to threaten the continued usefulness of the service."

Several stay orders were granted and, subsequently, *Part 19*, which was re-designated as *Part 95*, went into effect as amended on April 26, 1965.

III. JURISDICTION

47 USC Section 303 provides that the Federal Communications Commission has the power in the public interest to make rules and regulations controlling radio station operation in the United States not inconsistent with law and to enforce the same. *47 USC Sec. 303 (r)* states:

> "Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necesary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party."

Thus respondent Commision had the authority to promulgate rules to govern the Citizens Radio Service.

On February 24, 1965, respondent Commission adopted the proposed rules which went into effect April 26, 1965, and denied petitioner's petition for re-hearing and reconsideration which was duly filed on August 26, 1964.

47 USC Sec. 402 (a) provides:

> "Any proceeding to enjoin, set aside, annul or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 19A of Title 5."

Further *5 USC 1033* states:

> "The venue of any proceeding under this chapter shall be in the judicial circuit wherein is the residence of the party or any of the parties filing the petition for review, or wherein such party or any of such parties has its principal office, or in the United States Court of Appeals for the District of Columbia."

Plaintiffs residence for purposes of venue being in California, the petition is properly filed in the United States Court of Appeals, Ninth Circuit.

5 USC 1034 provides as follows:

> "Any party aggrieved by a final order reviewable under this chapter may, within sixty days after entry of such order, file in the court of

appeals, wherein the venue as prescribed by section 1033 of this title lies, a petition to review such order. Upon the entry of such an order, notice thereof shall be given promptly by the agency by service or publication in accordance

with the rules of such agency. The action in court shall be brought against the United States. The petition shall contain a concise statement of (a) the nature of the proceedings as to which review is sought, (b) the facts upon which venue is based, (c) the grounds on which relief is sought, and (d) the relief prayed. The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition upon the agency and upon the Attorney General of the United States by mailing by registered mail, with request for return receipt, a true copy to the agency and a true copy to the Attorney General."

Based upon the above quoted *47 USC 402 (a)* and *5 USC Sections 1033 and 1034* this petition for review is properly before this Court. Said petition represents the only pleading on file in the action herein.

IV. ERRORS RELIED UPON BY PETITIONER

1. The rules revisions are not suported by a preponderance of the evidence before the respondent commission.

2. The respondent commission exceeded its jurisdiction to effect the aforesaid rule changes in that it seeks to make changes in the frequencies and times of operation without the consent of the station licensee and without public hearing as provided in USC Title 47 Sections 303 (f) and 316 (a) after request for same.

3. Such rules revisions are in violation of USC Title 47 Section 326 in respect to censorship.

4. Such rules revisions are too vague to be enforceable.

5. Such rules revisions are unconstitutional in that they violate the provisions of the First Amendment of the United States Constitution in regard to freedom of speech.

6. Such rules revisions are arbitrary, capricious and not in the public interest.

7. Such rules revisions deprive the licensees of their property without due process of law in violation of the Fifth Amendment of the United States Constitution.

8. Some of the rules changes are in violation of Section 1002 (a) of the Administrative Procedures Act, USC Title 5, in that they were adopted without the publication required. The striking of Sec. 19.2 (a) of the regulations is an example.

9. That the enforcement of the newly adopted rules will cause petitioner, its members and their licensee members irreparable injury for which there is no adequate remedy at law.

V. STATEMENT OF THE CASE

Petitioner CALIFORNIA CITIZENS BAND ASSOCIATION, INCORPORATED has brought this proceeding in the above entitled Court for review of the Amendment of *Part 19* which are the rules and regulations of the FEDERAL COMMUNICATIONS COMMISSION, now known as *Part 95*, Citizens Radio Service. The aforesaid amended rules became effective April 26, 1965. Petitioner, who participated in the rule making procedures prior to the adoption of the aforesaid rules and regulations is asking the court to set aside the aforesaid Order of the Commission which became effective April 26, 1965, and to remand the matter to the Commission for further proceedings.

The grounds upon which petitioner urges the Court herein to make such action are set forth in Paragraph IV herein.

The petition filed herein contains the following four (4) Exhibits which will be referred to herafter:

"Exhibit A," Notice of proposed Rule Making published November 22, 1962.

"Exhibit B," Proposed Rule Changes of December 21, 1963, which were re-designated from Part 19 to Part 95.

"Exhibit C," Amendments of Part 95 of the Citizens Radio Service published July 31, 1964, to be effective November 1, 1964.

"Exhibit D," Final Order in respect to Proposed Amendments dated February 24, 1965.

For the convenience of the court, petitioner has referred to Exhibits A, B, C and D of the petition rather than to their specific pages in the transcript so it will be unnecesary each time a reference is made for the court to have to labor through the pages of the bulky transcripts; however, for the purpose of designation, if the Court would prefer to use the transcripts the Exhibits can be located as follows:

"Exhibit A" is Vol. I-A, pgs. 3-31, incl.

"Exhibit B," through inadvertance is not included in the transcript.

"Exhibit C," is in Vol. II-D, pgs. 779-826, incl.

"Exhibit D," is in Vol. II-E, pgs. 1080-1099, incl.

VI. THE LAW

1. The Rules Revisions Are Not Supported by a Preponderance Of the Evidence Before the Respondent Commision.

The evidence in the proceedings known as Docket 14843 was originally disclosed to petitioner by respondent commission as consisting of 28 Volumes of let-

ters, comments and petitions filed by interested persons and parties.

Through study of the aforesaid 28 Volumes by the respective counsel for petitioner and respondent commission, the abbreviated record of approximately 1,000 pages was filed with the Court. The reading of the aforesaid transcript will show hundreds of unfavorable comments in respect to the proposed rule making as well as a number of favorable comments. Petitioner has not counted the ayes and nays but believes that the unfavorable material far out-weighs the favorable. A further study of the record shows that most of the letters and other memoranda submitted were merely statements to the effect that they were approved or disapproved without any real explanation; however, there were a few, including petitioner, who set forth reasons, both legal and otherwise, why the amendments should not be adopted as proposed.

The respondent commission obviously did not resort to the aforesaid material received from the American public as its only means for determining the issues involved. Specific attention is drawn to "Exhibit A" wherein on page 11500 therein, the commission stated:

> "2. . . . However, monitoring, inspections and investigations by the Commission as well as numerous letters from licensees complaining of unnecessary interference to their operations

> indicate that misuse of citizens radio station operating privileges is so prevalent in some areas as to threaten the continued usefulness of the service."

On page 10 of "Exhibit D" which is the memorandum of opinion and order made by the Commission, paragraph 18 states:

> "There is one other matter which should be considered. Experience over a period of several years shows that, in a large number of cases, licensees who have been found to be in violation of this rule have, at some time in their exchange of communications, also transmitted communications which are permissible under the rules. However, typically, the great majority of the time involved in such exchange has been for hobbying activities. It is emphasized that such an inter-mixture of permissible communications with prohibited communications cannot justify the transmission of prohibited communications."

In "Exhibit C," under date of July 31, 1964 on page 11099, the commission which refers to miscellaneous amendments of Part 95 states:

> "4. We have reviewed this matter in light of operational experience over several years, as well as the comments filed herein, and reaffirm our determination that the public interest would not be served by permitting hobby type operations in the Citizens Radio Service. The

> rules adopted herein provide a useful and effective communication service for the large number of licensees whose needs may be met only in the Citizens Radio Service."

The foregoing comment was made by the FEDERAL COMMUNICATIONS COMMISSION in respect to hobby type operations.

The commission obviously has used evidence in these proceedings which is now before the Court. In December, 1965, petitioner made its motion requesting the Court herein to make its order requiring respondent Commission to produce the other evidence it relied on in making its decision amending the rules. Said motion was denied without prejudice to renewing the same at the time of the hearing herein. Petitioner feels that the Court now cannot properly determine whether or not there was substantial evidence to sustain the Commission's action.

5 USC 1009 (e) SCOPE OF REVIEW.

> "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (b) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

> law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by sustantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due acount shall be taken of the rule of prejudicial error."

It would therefore seem impossible for the reviewing court to determine whether or not there was substantial evidence to ascertain the Commission's findings as far as the record is concerned herein.

In "Exhibit A" which is *27 FR 11500*, the Commission states on page 11501 as follows:

> "10. . . . All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it, in addition to specific comments invited by this notice."

Demand is again made for the missing evidence so that a full determination can be made. The petitioner also urges that the transcript on file herein does not show substantial evidence necessary to uphold the decision.

Wertz v. *Baldor Electric Company, et al, 337 Federal Reporter, 2d Series, pg. 518* was a case involving a hearing under the Walsh-Healey Act wherein certain material was withheld as being confidential. The Court says on page 527:

> ". . . we have seen no other instance in which such an administrative agency (one in which executive and quasi-judicial functions are merged) has, by adopting rules which provide for tabulations based on secret material within its own possession, created evidence to be used against parties to a controversy before the administrative agency, and has ruled that the evidence cannot be attacked by the ordinary methods of cross-examination.
>
> "We think that this procedure violates the essential canons of fairness laid down by the Supreme Court. . . ."

On page 528, the court further states:

> "Indeed, cases such as (citing cases) suggest strongly that ordinarily the Government cannot take action adverse to a citizen in an administrative decision aimed directly at him or

his group, without disclosing the evidence on which it relies.

"(6) It does not follow, however, that courts will generally force the Government to reveal information it seeks to keep confidential. The Government, in situations of the present sort, has an option; it can hold back confidential material and take the risk of not being able to prove its case, or it can produce the material and allow it to be the subject of direct and cross-examination. There are, of course, occasions when a court will order the Government to break its pledge of confidentiality and produce its files for inspection."

The Court, therefore, set aside the determination of the Secretary on the further ground that it was not supported by reliable, probative, and substantial evidence.

Int. Com. Comm. v. *Louis. & Nash. R.R., 227 US 88.* This was a case of a rate-making procedure in which the Inter-State Commerce Commission had based the rate finding on information that it had previously obtained and which was not presented at the hearing. The Court held that such evidence could not be used in support of the findings made by the Commission because, pg. 93:

". . . such a construction would nullify the right to a hearing,—for manifestly there is no hearing when the party does not know what evi-

dence is offered or considered and is not given an opportunity to test, explain, or refute. . . . In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient informato support the finding."

2. The Respondent Commission Exceeded Its Jurisdiction to Effect the Aforesaid Rule Changes in That It Seeks To Make Changes in the Frequencies and Times of Operation Without the Consent of the Station Licensee and Without Public Hearing As Provided in U.S.C. Title 47 Sections 303 (f) and 316 (a) after Request for Same.

47 USC 303 (f) states as follows:

"Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: *Provided, however,* That changes in frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station

licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;"

Also, *47 USC 316 (a) and (b)* states as follows:

"(a) Any station license or contruction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this chapter or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested, why such order of modification should not issue: *Provided,* That where safety of life or property is involved, the Commission may by order provide for a shorter period of notice.

"(b) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission."

It is quite apparent that from the foregoing, a licensee must have notice in writing of any proposed license modification and an opportunity to show cause by public hearing, if requested, why such order of modification should not issue. From the transcript *Vol. II-C, page 852*, it can be seen that petitioner herein requested a hearing de novo. Also, from the transcript, *Vol. II-C, page 907 and 914*, at least two other parties petitioned for a hearing. No public hearing was ever held. The question now arises as to whether the amendments as proposed would constitute "modification" of the licenses already issued. A license to broadcast has value. The Court states in *L. B. Wilson, Inc.* v. *F.C.C., 170 F2 793* on *page 798:*

> "A broadcasting license is a thing of value to the person to whom it is issued and a business under it may be the subject of injury. We set forth in the margin quotations from decisions of the Supreme Court which support these statements and also provisions of the Communications Act itself which recognize that a broadcasting license confers a private right although a limited and feasible one. . . . And the Supreme Court has ruled that modification (within the meaning of that word as used in the section quoted) of an outstanding license may occur not only directly, by virtue of literal change of its terms, but also indirectly, through extension to another station of broadcasting facilities which will cause interference to the outstanding station within its lawfully protected

contour; and the Court has further ruled that the hearing provided for in the section quoted is required in respect of such indirect modification of an outstanding license as well as in respect of direct modification thereof."

In light of the foregoing decision, it will be necessary to examine the rule changes to see what is being modified. The following are expressly urged as being changes modifying existing licenses:

(a) Limiting interstation communication from 23 to 7 Channels. (Part 95.41 (d) (2)).

(b) Reducing the operating time from 5 minutes operation and 2 minutes of silence to 5 minutes of operation and 5 minutes of silence in interstation communication. (Part 95.91 (b7))

(c) Installing a 150 mile limit on range of operation where none existed before. (Part 95.83 (16h)

(d) Now makes an unincorporated association generally ineligible to hold Class D Station license. (Part 95.1 (13a))

(e) A licensee who is engaged in the business of selling citizens radio transmitting equipment is now prohibited from permitting a customer to operate under his station license. All communications for the purpose of demonstrating such equipment shall consist only of brief messages addresed to other units of the same station. (Part 95.83 (16c))

Also, in respect to the foregoing in *American Broadcasting-Paramount Theatres, Inc.* vs. *F.C.C., 303 F 2nd, p. 766*, the Court states on page 770 (this is a case where no hearing was granted):

> "Even granting the Commission the wide scope to which it is entitled in construing its own rules, we are not now dealing with the former section 312 which concerned the Court in Federal Communications Com. v. WJR, 337 U.S. 265, 278, 279, 69 S. Ct. 1097, 93 L. Ed. 1353 (1949). After that decision came down, Congress amended the Act. The present section 316 is the result. In our view Congress intended to protect the right to be heard—not where a purported issue of no substance is presented, to be sure—but certainly so (1) where no public interest are found to justify an initial grant without hearing and to support the refusal of hearing to an objector as in the circumstances shown here; and (2) where the Commission's claimed "discretion" as to what constitutes modification is so broadly asserted as to read section 316 right out of the Act. We find nothing in the Commission's FM rules permitting the interpretation now asserted. Congress authorized the Commission to promulgate appropiate rules for the conduct of its business, to be sure, but it did not grant the Commission "the congressional power of repeal".

Black's Law Dictionary defines modification as follows:

> "MODIFICATION. A change; an alteration which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject matter intact."

Certainly the changes made by the Commission in the operating rights and privileges of the Class D Station licensees constitute modification of an existing license and, therefore, upon request under the statutes, as is the case herein, a hearing should have been granted before the modifications were made effective.

Petitioner feels that in respect to the rules and regulations which became effective April 26, 1965, that there were some promulgated and made effctive that were not published in the Federal Register as required by 5 USC Sec. 1003 which reads as follows:

> "*Rule making.* Except to the extent that there is involved (1) any military, naval or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—.
>
> "Notice: publication and contents. (a) General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and

> nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impractical, unnecessary, or contrary to the public interest."

"Exhibit A" of petitioner's petition is the notice of the proposed rule making published in *27 FR 11500*, on November 22, 1962.

It is interesting to note that although the proposed rule making published November 22, 1962, made no mention of any limitation of transmission time. *28 FR 14173*, of December 21, 1963, *Sec. 95.81 (f)* limits the transmitting time to 5 consecutive minutes to be followed by a silent period of 2 minutes and reads, as follows:

> "(f) Except in the case of intercommunication between units of the same station, or in the case of communications involving the immediate safety of life, the immediate protection of property, or civil defense communications as pro-

vided in §95.121, the transmission of any Class D station or any exchange communications between two or more such stations shall not exceed five consecutive minutes and shall be followed by a silent period of at least two minutes in order to provide other stations an opportunity to use the frequency or frequencies involved; during this silent period the station(s) originally transmitting or communicating shall monitor all frequencies involved before any further transmissions are made."

Then in petitioner's petition with "Exhibit C" attached thereto which was published in *29 FR 11099* on July 31, 1964, and which is entitled Part 95 CITIZENS RADIO SERVICE—Miscellaneous Amendments, Sec. 95.81 was deleted and Sec. 95.91 sub. Sec. (b) decreases the operating time and states that after 5 minutes of transmission there be a period of silence of 5 minutes rather than 2 minutes as provided in *28 FR 14173*. Section 95.91 sub. Sec. (b) reads as follows:

"(b) Communications between or among Class D stations shall not exceed 5 consecutive minutes. At the conclusion of this 5-minute period or upon termination of the exchange if less than 5 minutes, the station transmitting and the stations participating in the exchange shall remain silent for a period of at least 5 minutes and monitor the frequency or frequencies involved before any further transmissions are made. However, for the limited purpose of ac-

knowledging receipt of a call, such a station or stations may answer a calling station and request that it stand by for the duration of the silent period. The time limitations contained in this paragraph may not be avoided by changing the operating frequency of the station and shall apply to all the transmissions of an operator who, under other provisions of this part, may operate a unit of more than one citizens radio station."

3. Such Rules Revisions Are in Violation of U.S.C. Title 47 Section 326 in Respect to Censorship.

47 USC §326 reads as follows:

"*Censorship.* Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

The following prohibited uses as outlined in 95.83 petitioner urges are in violation of the First Amendment to the United States Constitution and the aforesaid *47 USC 326* and constitute censorship.

"95.83 (a) A Citizens radio station shall not be used:

'(1) For engaging in radio communications as a hobby or diversion, i.e., operating the radio station as an activity in and of itself.

'(4) To carry communications for hire, whether the remuneration or benefit received is direct or indirect.

'(6) For any communication not directed to specific stations or persons, except for: (i) Emergency and civil defense communications as provided in 95.85 (b) and 95.121, respectively, (ii) test transmissions pursuant to §95.93, and (iii) communications from a mobile unit to other units or stations for the sole purpose of requesting routing directions, asistance to disabled vehicles or vesels, information concerning the availability of food or lodging, or any other assistance necessary to a licensee in transit.

'(9) For the direct transmission of any material to the public through public address systems or similar means.

'(10) To transmit superfluous communications, i.e., any transmissions which are not necessary to communications which are permissible.

'(13) For transmitting communications to stations of other licensees which relate to the technical performance, capabilities, or testing of any transmitter or other radio equip-

ment, including transmissions concerning the signal strength or frequency stability of a transmitter, except as necesary to establish or maintain the specific communication.

'(14) For relaying mesages or transmitting communications for a person other than the licensee or members of his immediate family, except: (i) Communications transmitted pursuant to §§ 95.85(b), 95.87(b)(7), and 95.121; and, (ii) upon specific prior Commission approval, communications between citizens radio stations at fixed locations where public telephone service is not provided.

'(15) For advertising or soliciting the sale of any goods or services.

'(16) For transmitting messages in other than plain language. Abbreviations, including nationally or internationally recognized operating signals, may be used only if a list of all such abbreviations and their meaning is kept in the station records and made available to any Commission representative on demand.' "

Petitioner recognizes the fact that certain acts which are criminal in nature such as the use of obscenity and advocating the overthrow of the government by force and violence, as examples, are not protected by *47 USC 326*. Censorship is apparently predicated upon the determination by respondent Commis-

sion that the public convenience, interest or necessity would be served thereby. None of the sections of 95.83 (a) supra have heretofor been defined as criminal acts. Violations of their directives are now criminal and subject to punishment under *47 USC 501 and 502* which read as follows:

> *"47 USC 501:* Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this cahpter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000 or by imprisonment for a term not exceeding two years, or both."
>
> *"47 USC 502:* Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this chapter, or any rule, regulation, restriction, or condition made

> or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs."

It is therefore urged that prohibiting the use of certain language on radio and making it a crime for so doing, when normally the use of such language is legal, is censorship in violation of *47 USC 326*.

4. Such Rules Revisions Are too Vague To Be Enforceable.

Ordinarily, penal statutes are strictly construed and cannot be enforced if they are v a g u e and not clearly defined. A person must be certain as to what the law is that he is required to obey.

In "Exhibit C", which is attached to petitioner's petition, respondent Commission uses 6 pages to explain the meaning and intent of the new rules and the reasons for the change. Obviously, the Commission itself realizes that an ordinary individual in reading the rules himself would find many instances in which they would be unintelligible. For example, 95.83 (10) states:

> "To transmit superflous communications, i.e., any transmissions which are not necessary to communications which are permissible."

The question arises as to what are superflous transmissions and what transmissions are not necessary. *95.83 (15)* states:

> "For advertising or soliciting the sale of any goods or services."

What constitutes advertising? If one is in the business of electronic instruments and in the sale and repair of electronic instruments, how far can the businessman go in dealing with customers or potential customers of CB.

Sec. 95.13 states as follows:

> "(a) Subject to the general restrictions of §95.7, any person, other than an unicorporated association in the case of a Class D station, is eligible to hold an authorization to operate a station in the Citizens Radio Service: *Provided*, That if an applicant for a Class A, Class B or Class D station authorization is an individual or partnership, such individual or each partner is eighteen or more years of age or if an applicant for a Class C station authorization is an individual or partnership, such individual or each partner is twelve or more years of age."

Sec. 95.87 (b) sub. Sec. 4 reads as follows:

> "The members, if the licensee is an unincorporated association, provided the communications relate to the business of the association."

It would seem in one breath, the Commission finds an unincorporated association is not eligible for a Class D station license and in the next breath, the members of an unincorporated association which has a Class D license can operate the radio.

In "Exhibit D" *Vol. II-E* states on *page 7* as to vagueness, as follows:

> "*Vagueness.* 13. It is next urged that proposed Section 95.83 (a) (1) is so vague that a licensee cannot reasonably understand which communications are authorized and w h i c h are prohibited.
>
> "One petitioner states:
>
> > 'The control of communication cannot be made by rules which are so vague as to make it almost impossible to ascertain the circumstances to which they apply. Where constitutionally valid conditions are imposed on speech by governmental authority, the standards by which one is required to act must be stated in such a way as to be clearly ascertainable . . . the fact that it is difficult to write clear standards does not make valid otherwise invalid regulation. The burden is on the governmental authority to meet the constitutional requirements."

The law is quite clear that statutes cannot be vague and at the same time be constitutional. In *Connally* v.*General Construction Co.* the Court states on *Page 328* as follows:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

In *Winters* v. *New York, 337 US 507,* the Court states on *page 509:*

> ". . . It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment. (cites cases) A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press . . ."

In respect to the word "hobby" which has been defined in *Coffey* v. *Commissioner of Internal Revenue, 141 F 2d, pg. 205,* as follows:

"In his regulations the Commissioner properly recognized the distinction between property operated as a business venture and property used for recreation as a hobby. In the one instance the dominant m o t i v e is the realization of a profit; in the other the objective is pleasure or relaxation, and regular operation at a loss would have little effect upon continued operation. Considering the taxpayer's regular occupation and finacial position, the size and character of the orchard, and the record of its operation over a four-year period, we think the Board correctly concluded that the greater emphasis was upon the cultivation of the orchard as an adjunct to to the country estate, rather than as a business venture. These deductions properly were disallowed.

"The decision of the Tax Court is affirmed."

Thus, under *Part 95* supra, apparently, one can talk about hobbies on CB providing the hobby is not radio; discussing bridge, chess, hunting, etc., are proper but, apparently, not radio.

5. Such Rules Revisions Are Unconstitutional in That They Violate the Provisions of the First Amendment of the United States Constitution in Regard to Freedom of Speech.

The First Amendment of the United States Constitution provides as follows:

"AMENDMENT (I) Congress shall make no law respecting an establishment of religion, or

> prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances."

In respect to the question of freedom of speech, respondent commission in its memorandum opinion and order which is "Exhibit D" herein, cited on pg. 6 of said Exhibit, the case of the *National Broadcasting Company* v. *U.S. 319 US 190 (1943)*. In essence, this case held that the commission had the burden of controlling radio traffic as well as the regulation of engineering and technical aspects. Also, that freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. The aforesaid decision concerned rules by the commission which regulated chain broadcasting. Petitioner believes that the aforesaid *NBC* v. *US*, supra can be distinguished from the case herein at bar in several ways. What may have been true in 1943 is not necessarily the case in 1966. The history of radio itself shows a steady advancement over a period of over 60 years from the time Marconi first sent out his feeble signals until the present day wherein we have our complex networks with a very wide spectrum of frequencies. It must be remembered that when Marconi sent out his signal, there was one channel in the whole radio spectrum. Now there are thousands. World War II was very important in the development of radio communication in view of the vital necessities of a war-time period. However, at the time of the National Broadcasting decision in 1943 the Supreme Court, no doubt, had in mind the war-

time atmosphere and the fact that the control and safe-guard of communications was then extremely vital to the national defense; however, at the end of the war, respondent commission conceived the idea of forming the Citizens Radio Band and began to explore its possibilities and to make studies. From that beginning, Citizens Radio Service was formed. In addition, there were formed at least 40 other types of safety and Special Radio Services. These 40 odd services represent almost all of the non-government use of radio other than Broadcast or Common Carrier. In these other services, petitioner is not aware that any are curtailed as the Citizens Radio Service has been in respect to free speech.

95.83 (a) (16), supra, provides a Citizens radio station is prohibiting for transmitting messages in other than *plain* language.

Webster's New World Dictionary defines the word "plain" as follows: 1. flat, level. 2. open; clear: as in plain view. 3. clearly understood, obvious. 4. outspoken; straightforward. 5. Not luxurious. 6. not complicated; simple.

Section 95.83 (a) (16), supra, makes mandatory that licensees use "plain" language in their transmissions. Under the definition of the word "plain" as seen above, the statute might first be attacked for vagueness and, secondly, as being in violation of the First Amendment to the United States Constitution limiting free speech. What is uncomplicated language? Does that mean that a person cannot use technical terms such as might occur when a physician transmits

a message to another doctor advising a course of treatment? A licensee should be able to say anything on the air which he cannot otherwise say publicly. One petitioner states *(Trans. Vol II-A, pg. 852)*.

> "5. It is unthinkable that the FCC should attempt to suppress any discussion of social, political, or religious issues which are not clearly subversive in nature. Gentlemen, our Constitution terms this the right of free speech and guarantees the right of every American citizen to state his personal beliefs by any public means, whether by newspaper, commercial radio, TV, or CB. The radio spectrum is, or should be, in the domain of the people, and that very narrow portion allotted to Class D operation is the only portion left over for the average citizen after all the governmental agencies had taken their requirements. Police it, yes, but not make it prohibitive. We are well aware of the dangers of subversion by all means of communication. But for each subversive agent there are hundreds of thousands of honest, loyal Americans. In restricting the rights of a free people you will be well on the way to achieving their very purposes from within."

The nature of the regulations in general, due in part to the vagueness of some, make it very difficult for a licensee to determine how far he may go in respect in excercising his rights under the First Amendment in respect to freedom of speech. As one petitioner states *(Trans. Vol. II-E, pg. 1065)*:

"II. The Proposed Section 95-83 appears vague, misleading and ambiguous.

> 'a. Although the Citizens Radio Service is authorized for personal communications, it appears that the proposed change attempts to regulate the contents of communications by prohibiting certain communications which are part of a "hobby" or are "intended for diversion." The vaguely worded proposal leaves the licensee in complete uncertainty as to what are permissable communications, and at the same time provides a censorship of individual communications based on value judgements as applied by the individual monitoring activity.
>
> 'b. The determination of a communication as "personal" or non-personal" is highly controversial and is entirely dependent on the circumstances surrounding each specific communication. Any attempt to generalize these into categories or to apply judgemental decisions resulting in citation action, appears to be a dangerous application of censorship. What appears to be a personal conversation to one licensee, would general be classed differently by a non-participant."

6. Such Rules Revisions Are Arbitrary, Capricious and Not in the Public Interest.

Petitioner urges that the rule revisions promulgated by respondent FCC are arbitrary and capricious and not in the public interest.

The California Citizens Band Association which during the course of the proceedings in Docket 14843 incorporated as a non-corporation entitled California Citizens Band Association, Incorporated and is the petitioner herein.

In *Vol. I-E, pg. 449* petitioner filed comments in respect to proposed rule changes. Subsequently, a petition was filed by the said California Citizens Band Association which is contained in *Vol. I-E, pages 515 to 564.* The latter document contained many objections, proposals and discussions concerning the rule changes.

The respondent commission has stated that in respect to the alleged change in the time of operation and of the change of frequency, as follows:

> "Exhibit D", paragraph 26 on pg. 14:
>
> "26. The Commission has concluded that the proposed amendment of Section 95.41 (d) would not change the frequencies available to the petitioners and that proposed Section 95.91 (b) would not change the times of operation of the petitioners' radio stations within the meaning of Section 303(f) of the Act. In any event, even were we to assume, for the purpose of argument, that there has been a change in frequencies and times of operation, a hearing is not required in this case because there are no substantial and material questions of fact presented by the pleadings on these questions but only matters of law and policy."

Such arbitrary action should not be taken wherein the commission merely states that there is no substantial and material questions of fact presented by the pleadings on these questions but only matters of law and policy.

In *Trans. Vol. I-E, pg. 518*, petitioner states as follows:

". . . It is significant to note that by far the bulk of the Class D traffic in California, and in most other areas, is so-called inter-communications or communications between units of different stations. This proposed rule making is *not* only *not* an extension or interpretation of the COMMISSIONS original purpose, but is, in addition, discriminatory against the vast majority of the very CITIZENS for which Citizens Radio services in general and Class D service specifically were created. It is only axiomatic that these moves are proposed upon the complaints of a small minority of users and that even those they represent cannot make up a very large segment of those licensees presently active in the Class D service . . . *pg. 520.* In addition, the frequencies allotted for inter-communication are those least capable of bearing the traffic necessary to serve this very useful function. Of the five frequencies proposed, all are notoriously unreliable due to interference from other services and from diathermy equipment. Equipment in Class D service cannot be so finely adjusted, for instance, as to avoid interference from radio diathermy uses."

Referring to *Trans. Vol. I-C, pg. 335*, one petitioner states as follows:

> "Further objection is offered to the first four channels being consecutive in frequency. These four channels will be required to handle 95% of all inter-licensee communications and with the broad band pass of current sets in use today adjacent channel reception is 95% as effective as the channel the receiver is tuned to. The Class D licensee has learned from experience that consecutive channel operation is impractical except with a good dual conversion receiver whereby co-channel interference is minimized. We respectfully suggest that the Commission review this section with some consideration toward a more equitable division of channels for both inter-licensee and intra-licensee communication, also a spreading of the channels for inter-licensee communication."

Certainly the foregoing comments in respect to limiting the frequency herein, interstation communication raises substantial questions of fact in regard to interference.

As another example, we are concerned with the broadcasting time requirements set forth in 95.91 (b) supra. It should be obvious that different radio districts in the United States present different problems in regard to use of the Citizens Radio Service. In the heavily populated metropolitan areas, it is easy to see the need because of the traffic congestion. A silent period is desirable in order to give more licensees the opportun-

ity of using the air; however, in rural and sparsely populated areas where public telephone service is less accessible, the silent period should not have to be of the same duration as that prescribed for the metropolitan areas. Many farmers, ranchers and small town businesses utilize Class D Citizens Radio Service quite extensively in their operations. However, in the smaller populated areas, the air waves are not as jammed as in the heavily populated places. It would seem to be a substantial question of fact as to what silent time is necessary in respect to the different areas of our country. There is no sense forcing someone to leave the air when the same is unnecessary. For example, in one of the comments, a Maine CBer points out that he works on a coastal vessel which uses CB radio for ship to shore communication. It would seem that forcing ships to observe 5 minutes of silence while on the high seas could result in considerable inconvenience and possible danger. Another question of fact to be considered is antenna height. There were many comments protesting new restrictions on antenna structures. *95.37 (c)* provides:

> "An antenna at a fixed location to be used by Class B, Class C, or Class D mobile station shall not exceed 20 feet in height above any man-made structure or natural formation on which it is mounted, except that when mounted on an existing antenna structure of another station the antenna shall not exceed the height of that antenna structure."

19.25 (a) (1), the old rule, provided as follows:

> "The antenna structures proposed to be erected will exceed an overall height of 170 feet above ground level, except where the antenna is mounted on top of an existing man-made structure, other than an antenna structure, and does not increase the overall height of such man-made structure by more than 20 feet;"

As can be seen under the new rule, antenna height has been drastically reduced.

One petitioner states in *Trans. Vol. I-C, pg. 306, as* follows:

> "(1) *Paragraph 19.25.* Limitations on Antenna Structures. A twenty foot height seems to be a very arbitrary ruling, and discriminatory in many cases. Many of us are located in terrain such that this makes our radios unworkable for a large portion of our problems. Most authorities agree that the *minimum* height above ground for effective ground wave coverage is one wave length. One wave length, as you know, is much longer than 20 feet. We who live in remote isolated areas, much of which is rugged terrain, believe that this ruling effectively limits the uses of our radios contrary to the purpose of the citizens radio service and good public policy and we strongly object to this amendment. We urge, rather, that antenna height limitations be raised, rather than lowered."

Certainly antenna height raises a substantial question of fact as to what is needed in the different areas.

In rural areas a rancher might need the 150 miles range for effective use of his CB equipment. It is a question of fact as to what limitations should be on antenna heights. The aforesaid rancher would certainly need greater antenna height than the CBer who lives in the thickly populated areas. Placing such a limitation as the new rule provides, without any evidentiary hearings, is certainly arbitrary and capricious.

Section 19.1 (a) of the old rules, in effect prior to April 26, 1965, which was entitled basis and purposes and which read as follows:

> "Definitions of services. *Citizens Radio Service.* A radio communications service of fixed, land, and mobile stations intended for personal or business radio-communication, radio signalling, control of remote objects or devices by means of radio, and other purposes not specifically prohibited in this part. *Fixed service.* A service of radio-communication between specified fixed points.
>
> *Mobile service.* A service of radiocommunication between mobile and land stations or between mobile stations."

was not referred to in any way or manner whatever in the proposed notice of rule making which is "Exhibit A" of petitioner's petition and no notice whatever of an intent to amend the purposes and basis of Part 19, as expressed in 19.1, now 95.1 which was given. *95.1* reads as follows:

"Basis and purpose. The rules and regulations set forth in this part are issued pursuant to the provisions of Title III of the Communications Act of 1934, as amended, which vests authority in the Federal Communications Commission to regulate radio transmissions and to issue licenses for radio stations. These rules are designed to provide for private short-distance radiocommunications service for the business or personal activities of licensees, for radio signalling, for the control of remote objects or devices by means of radio; all to the extent that these uses are not specifically prohibited in this part. They also provide for procedures whereby manufacturers of radio equipment to be used or operated in the Citizens Radio Service may obtain type acceptance and/or type approval of such equipment as may be appropriate."

This limitation in respect to the other purposes which were previously lawful was done arbitrarily and capriciously and not in the public interest in that there is no evidence in the record to warrant such a change. Petitioner urges that the above cited rule changes were not duly made in that there is no substantial evidence in the record to substantiate the changes.

7. Such Rules Revisions Deprive the Licensees of Their Property Without Due Process of Law in Violation of the Fifth Amendment of the United States Constitution.

Petitioner herein urges that the action of the respondent commission complained of herein deprives its

licensee subsidiary members of their property without due process of law in violation of the due process clause of the Fifth Amendment to the United States Constitution. The aforesaid deprivation is based on five grounds which are specified as follows:

(1) Rules were promulgated without due notice as required by law.

(2) Rules were promulgated without a hearing as required by law.

(3) Rules were promulgated which were arbitrary.

(4) Rules were promulgated which were in the form of a bill of attainder.

(5) Evidence was used which was not made known to petitioner.

In regard to (1), petitioner will develop its contentions in Paragraph 8 of the specification of errors which will follow immediately. In regard to (3), petitioner has already discussed the same in Paragraph 6 of the specifications of errors herein.

In regard to specification (2) above, supra, *Title 5 USC Sec. 1003*, provides that general notice of the proposed rule making shall be published in the Federal Register and either the terms or substance of the proposed rule or a description of the subjects and issues involved.

In addition, *47USC, Sec. 301 states as follows.* "It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any ves-

sel or aircarft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter."

Also, *47 USC Sec. 303 (f)* states:

"Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: *Provided, however*, That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully compiled with."

Petitioner again refers to *47 USC Sec. 316* which requires a hearing for modification of a license.

Admittedly, herein the respondent Commission did not hold public evidentiary hearings in regard to the proposed rule amendments before their adoption. The respondent Commission contends that everyone had an opportunity of being heard, that there were no substantial or material questions of fact to warrant a hearing and that limitations of interstation communication from 23 channels to 7 and the increase of

silence time from 2 to 5 minutes after 5 minutes of transmission did not constitute modification of existing licenses requiring a hearing under *47 USC 303 (f) and 316*. In addition, there were other changes which occurred which will be discussed in the next specification of error.

A broadcasting license is a thing of value to the person to whom it is issued and a business under it may be the subject of injury. A broadcasting license confers a private right although a limited and defeasible one. The Supreme Court has ruled that a modification of an outstanding license may occur not only directly, by virtue of literal change of its terms, but, also, indirectly through extension to another station of broadcasting facilities which will cause interference to the outstanding station within its lawfully protected contour. The Court has further ruled that the hearing provided for is required in respect of such indirect modification of an outstanding license as well as in respect of direct modification thereof. See *C. B. Wilson, Inc.* v. *FCC, 170F2 793*, supra.

2 Am. Jr. 2nd, pg. 197 states:

> "The Federal Administrative Procedure Act provides except as statutes otherwise provide, the proponent of a rule or order in an adjudication type hearing has the burden of proof."

In the cases of *Morgan* v. *U.S.*, which were reported in *298 US 468 and 304 US 1*, the Court held that due

process required the necessity of maintaining a full and fair hearing with the rights of the appellants to have a reasonable opportunity to know the claims advanced against them as shown by the findings proposed by the Bureau of Animal Industry. The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the excercise of their appropriate authority. If upon the facts alleged, the "full hearing" required by the statute was not given, petitioners were entitled to prove the facts and have the secreatry's order set aside. Nor is it necessary to go beyond the terms of the statute in order to consider the constitutional requirement of due process as to notice and hearing. For the statute itself, demands a full hearing and the order is void if such a hearing was denied.

2 Am. Jur 2nd, 195 states as follows:

> "Administrative agencies frequently do and ought to conduct independent investigations as a means to the excercise of intelligent action, and they are not bound as is a court to acquire information concerning matters involved in the proceedings before it entirely from the evidence produced. This is held as to administrative determinations which are not quasi-judicial in character or for which no hearing is required. The same holding has been made as to proceedings generally regarded as adjudi-

catory or quasi-judicial in nature, but as to such proceedings it is generally held that even though an administrative authority has statutory power to make independent investigations, it is improper for it to base a decision or findings upon facts so obtained, unless such evidence is introduced at a hearing or otherwise brought to the knowledge of the interested parties prior to decision, with an opportunity to explain and rebut. An administrative agency may make use of reports and data gathered by members of its own staff or outside investigators or investigating bodies or reports of advisory panels, but generally cannot properly base its decision or findings upon facts so obtained, unless such evidence is introduced at a hearing or otherwise brought to the knowledge of the interested parties prior to decision with an opportunity to explain and rebut. An administrative agency may make use of reports and data gathered by members of its own staff or outside investigators or investigating bodies or reports of advisory panels, but, generally cannot properly base its decision and findings upon such reports without introducing them in evidence so as to afford interested parties an opportunity to meet them." See *U.S.* v. *Abilene & So. Ry. Co. 265 US 275, 389.*

It is also urged that the Article I Sec. 8 of the U.S. Constitution provides that Congress shall pass no bill of attainder Petitioner urges that the sanction and

punishment provided in *47 USC 501, 502, 510* violates the aforesaid Article I Sec. 8 of the U.S. Constitution.

8. Some of the Rules Changes Are in Violation of 5 USC 1002 (a) in That They Were Adopted Without the Publication Required.

5 USC 1002 (a) reads as follows:

"Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, with methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and, (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published."

5 USC 1003 (a) requires publication:

> "Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts—"

The following sections of Part 19 were amended without benefit of publication:

19.1 now *95.1* entitled Basis and Purpose was not referred to in the Notice of Proposed Rule making (Exhibit A) which was published in the Federal Register on November 22, 1962. This omission has already been discussed in section 7 of the assignment of errors herein.

19.2 (a) stated as follows:

> "Citizens Radio Service. A radio communications service of fixed, land, and mobile stations intended for personal or business radiocommunication, radio signalling, control of remote objects or devices by means of radio, and other purposes not specifically prohibited in this part."

The aforesaid definition was deleted without benefit of publication and 95.3 (a) adopted which reads as follows:

> "Citizens Radio Service. A radiocommunications service of fixed, land and mobile stations in-

tended for short-distance personal or business radiocommunications, radio signalling, and control of remote objects or devices by radio; all to the extent that these uses are not specifically prohibited in this part."

In studying the aforesaid change, it is obvious the respondent Commission imposed severe limitations upon the rights and privileges the licensees, including those of petitioner, formerly enjoyed. Such limitation should not be permitted to remain when the agency failed to follow the statutory requirements.

95.3 (c) gave a new interpretation to "man-made structure" by defining the same as meaning "any construction other than a tower, mast or pole." Previously that had been no such limitation in 19.25 (2) (c). This latter change will in all probability have a serious effect on those class D licensees who live in remote areas and consequently require greater antenna height to be to efficiently operate their class D radio equipment.

These examples of rule making without conforming to the legal requirements result in damage to the licensees of petitioner.

9. The Enforcement of the Newly Adopted Rules Will Cause Petitioner, Its Members and Their Licensee Members Irreparable Injury for Which There Is No Adequate Remedy at Law.

Petitioner will briefly point out to the Court that its members and their members have spent thousands

of dollars for CB equipment. The reasons given for the drastic rule changes are that there is now too much abuse of the privilege and that the band is overcrowded. In regard to the former, there is no reason why the great majority should have to suffer for the misdeeds of the few. In respect to the latter, open a few more frequencies to the citizens radio service which are now available. The average CBer has no defense against improper rule making by the respondent commission. The privileges afforded to him by his license are whittled away without due process of law and he has no legal redress. The Court herein should act to prevent the irreparable injury.

VII. CONCLUSION

In conclusion, it is urged that for the reasons heretofore stated, that the Court herein set aside the rules promulgated by respondent commission effective April 26, 1965 and remand the case to the respondent commission so that full hearing may be had.

Dated at Oakland, California, August 4, 1966.

Respectfully submitted,

SEA & HANNA

Attorneys for Petitioner

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Donald M. Sea